Supreme Court, U.S.
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No. 92-1776

In The

Supreme Court of the United States

October Term, 1992

MOSSIE JOHNSON,

Petitioner,

v.

DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and ROSE'S STORES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Commonwealth Of Kentucky

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Delong v. Delong, Ky. 335 S.W. 2d 895 (1960) 3

Simpson v. Antrobus, Ky. 86 S.W. 2d 544 (1935) 3

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) ..... *passim*

Parratt v. Taylor, 451 U.S. 527, 61 L. Ed. 2d 420, 101 S. Ct. 1908 (1981) 4, 5

Commonwealth, to Use of Green v. Johnson, 123 Ky. 437, 96 S.W. 2d 801 (1906) 5

STATUTES

KRS 413.140 2

KRS 38.030 5

RULES

Kentucky Rules of Civil Procedure 3 2

Kentucky Rules of Civil Procedure 4.01 3

COUNTERSTATEMENT OF THE CASE

The Petitioner, Mossie Johnson, allegedly was injured on September 13, 1989, when she fell on a concrete barrier located on the premises of the Rose's Department Store in Corbin, Kentucky. The resulting lawsuit was filed on September 10, 1990, in the Whitley County Circuit Court. However, the action was not commenced within the applicable statute of limitations in that a summons was not issued until September 14, 1990; one day after the statute of limitations had expired.

Both Respondents then filed Motions to Dismiss raising the defense of statute of limitations. Both Motions were granted by the Judge of the Whitley Circuit Court. This judgment was upheld by the Court of Appeals of Kentucky and discretionary review was denied by the Supreme Court of Kentucky.

The issue raised by the Petitioner in the Court of Appeals and now in the United States Supreme Court is whether the trial court's dismissal of the action in any way violated the Petitioner's Fourteenth Amendment rights of due process or equal protection.

SUMMARY OF THE ARGUMENT

Petitioner, Mossie Johnson, has filed a Petition For a Writ of Certiorari to the Court of Appeals for the Commonwealth of Kentucky. Petitioner primarily relies on *Logan Brush Company v. Zimmerman*, 455 U. S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982) in support of her

allegation that her due process rights and equal protection rights were violated as a result of the failure of the Whitley Circuit Court Clerk to issue summons within the statute of limitations applicable to her personal injury action.

Logan, however, is distinguishable from her case in all aspects in that Petitioner's counsel had a duty to ensure that the action was commenced within the applicable statute of limitations, Petitioner is not without recourse if any act of negligence was performed by the Circuit Court Clerk, and Petitioner is not challenging that system itself but only a single act within that system. Also, with regard to the equal protection claim, Petitioner's claim is without merit because the applicable standard is rationally based.

Thus the Respondent, Rose's Stores, Inc., requests that the Petition for A Writ of Certiorari from the Court of Appeals for the Commonwealth of Kentucky be denied.

ARGUMENT

I

THE DECISION OF THE KENTUCKY COURT OF APPEALS IS CORRECT IN STATING THAT NONE OF PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED.

The Petitioner's underlying action arises out of an alleged personal injury which, in Kentucky, carries a one year statute of limitations. Pursuant to KRCP 3 and KRS 413.140 an action is commenced only when the complaint is filed *and* a summons is issued. It is well established in

Kentucky that failure to issue a summons within the applicable statute of limitations is fatal to the claim, *Delong v. Delong*, Ky., 335 S.W. 2d 895 (1960); *Simpson v. Antrobus*, Ky., 86 S.W. 2d 544 (1935). In the instant action, the summons was not issued until one day after the applicable statute of limitations had expired resulting in dismissal of the action.

The Petitioner has alleged that the clerk's failure to issue the summons "forthwith" upon the filing of her complaint pursuant to KRCP 4.01 is a violation of her Fourteenth Amendment due process rights due to the resulting dismissal of her action. She bases her argument on *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 71 L. Ed. 2d, 265, 102 S. Ct. 1148 (1982).

In *Logan*, a probationary employee was discharged from his duties and filed a timely complaint with the Illinois Fair Employment Practices Commission. The Commission then had an obligation under the state's Fair Employment Practices Act to hold a factfinding conference within 120 days. The conference was not scheduled until 5 days after the 120 days had expired resulting in Mr. Logan's claim being dismissed leaving him with no further recourse. This dismissal was overturned by the U. S. Supreme Court as violative of Mr. Logan's due process rights.

As pointed out by the Kentucky Court of Appeals, *Logan* is distinguishable from the instant case. The scheduling of the required hearing in *Logan* was beyond the appellant's control. However, in the instant case, appellant's counsel is charged with knowing that a summons must be issued in order to commence an action, and there

was no evidence adduced at the hearing on the Motion to Dismiss showing that appellant's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that counsel checked with the clerk to ensure that a summons had been issued.

The instant case is further distinguishable to *Logan* with regard to the finality of the deprivation. Unlike the Petitioner here, Mr. Logan had no other means of recourse available to him upon dismissal of the action. This distinguishing factor is explained by the court in *Parratt v. Taylor*, 451 U. S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In *Parratt*, an inmate in a Nebraska prison was deprived of personal property through the negligence of prisoner employees. The stated question was whether an allegation of simple negligence is sufficient to give rise to a claim of violation of due process. The Court stated "in particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Id.* at 537. The Court decided that because Nebraska had in place sufficient remedies for losses such as those suffered by the Petitioner that a Fourteenth Amendment violation had not occurred. The Court further stated,

> To accept Respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. *Id.* at 544.

The reasoning in *Parratt* is much more in line with the underlying case in that Kentucky does provide adequate remedy for any deprivation suffered by the Plaintiff. Section 103 of the Kentucky Constitution requires that clerks give a bond and KRS 38.030 requires that all clerks be bonded for the faithful performance of their duties.

Furthermore, in the case of *Commonwealth, to use of Green v. Johnson*, 123 Ky. 437, 96 S.W. 801, 802 (1906), the highest court in Kentucky held that clerks are liable for errors committed in their ministerial functions unless they can show that the errors occurred in spite of use of reasonable care and diligence. Therefore the laws of Kentucky do supply a remedy for Plaintiff's alleged deprivation.

Finally, these two cases were distinguished in *Logan* itself with the Court stating:

> unlike the complaint in *Parratt*, *Logan* is challenging not the commission's error, but the "established state procedure" that destroys his entitlement without affording him proper procedural safeguards. *Logan* at 436.

As in *Parratt*, the petitioner here is challenging an isolated act by a state employee and not the procedure involved itself.

For the above reasons, the Petitioner has failed to establish a violation of her due process rights and the Petition for a Writ of Certiorari should be denied.

II

PETITIONER's FOURTEENTH AMENDMENT EQUAL PROTECTION RIGHTS HAVE NOT BEEN VIOLATED.

To support her argument of the violation of the equal protection clause, Plaintiff also relies on *Logan* supra. Although the court in Logan did not decide the issue of whether an equal protection violation had occurred, Justice Blackmun in his separate opinion seemed to believe that a violation had occurred because two disparate classes were created by the procedure in question without a rational basis.

Although it may be that the Kentucky statute creates two classes; those individuals whose summons were issued within the statute of limitations and those who were not, the situation once again is distinguishable from that in *Logan*.

The Illinois statute divided claimants into two groups which were accorded different treatment. Those claims processed within 120 days were given full consideration on the merits. Those that did not receive a hearing within the time period were finally terminated. As the Court stated in *Logan*,

> For over a century the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the equal protection clause guarantees. At the minimum level, however, the Court "consistently has required that legislation classify the person it affects in a manner rationally related to legitimate governmental objectives". This is not a

> difficult standard for a state to meet when it is attempting to act sensibly in good faith. But the 'rational basis standard is not a toothless one'. *Id.* at 439. Citations omitted.

According to the opinion of Justice Blackmun, creation of the two classes in the Illinois statute in question did not meet the rational basis test. This was because the two purposes behind the standard of eliminating employment discrimination and protecting employers and other potential defendants from unfounded charges of discrimination were not furthered by the 120 day deadline provision. *Id.* at 439.

However, the underlying purpose for specifying a statute of limitations for particular cause of actions certainly is advanced by establishing the unequivocal deadline for commencing an action within that statute of limitations. This purpose is advanced by Kentucky's rule requiring that the complaint be filed and summons issued within the applicable statute of limitations. Furthermore, the petitioner is not challenging the system itself, but is challenging an isolated act involving that system.

Therefore the Petitioner's allegations of a violation of equal protection are without merit and the Petition for a Writ of Certiorari on these grounds should be denied.

CONCLUSION

As has been established, Petitioner's claim that her due process rights and equal protection rights were violated by the dismissal of her action as being time barred by the applicable statute of limitations is without merit. The primary case on which Plaintiff bases her claim is in every way distinguishable from her own claim. Accordingly, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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